

Joint Capital Planning Committee (JCPC) Minority Report
Written by JCPC member, Carol Gray
April 21, 2010

As a member of the Joint Capital Planning Committee (JCPC), I am providing this report summarizing why I voted against recommending Article 16 pertaining to the Patterson property and why I abstained from recommending the tentative five year plan incorporated into the JCPC's report.

My opposition to the Patterson Property Option Agreement is based on the following factors:

1) Project doesn't fit the definition of a 'capital expense'.

This \$120,000 expenditure is recommended from funds reserved for capital expenditures. The definition of a capital projects qualifying for such funds set forth the Finance Committee's booklet from January 2008 entitled "Financial Management Policies & Objectives" is as follows: "Definition of a capital project: a capital improvement is a tangible asset or project with an estimated useful life of five (5) years or more, and a cost of \$5,000 or more." In my view, this project does not fit the definition for a capital project since it is a one year option (renewable for two additional years). It is also important to note that this type of project does not fit squarely within any of the named categories of items which are contemplated to be capital expenses.¹

2) No feasibility study was provided:

While I appreciate that town staff and town counsel have expended a substantial amount of time crafting this proposal, one critical missing piece is any independent determination that such a project has a reasonable chance for success. There is no marketing analysis indicating that there is any company or developer (let alone one that focuses on research or some other type of business Amherst would welcome) that would be interested in this property. Likewise, there is no marketing study indicating what other land of this type is already available for purchase or lease in other neighboring communities.

When I asked why there had not been a marketing study done, I was informed that town staff was quite knowledgeable about such issues and that studies cost money. However there was no indication that anyone had investigated the cost of a feasibility study and if so, what the cost would be.

- Would it be less than the thousands already spent on legal fees?
- Would it be less than \$120,000 plus the value of hundreds of staff hours trying to implement this project?

We don't know; but we should know.

¹ The 2008 "Financial Management Policies & Objectives" state that, "[a]mong the items properly classified as capital improvements are: 3. Land acquisition and/or improvement, unrelated to a public building, but necessary for conservation or park and recreation purposes." This proposal does not fit neatly into this or any of the other categories.

A feasibility study is essential according to one text book entitled *Planning Local Economic Development: Theory and Practice*. Chapter 12, focusing on "Building the Implementation Plan" for local economic development, discusses the need for feasibility studies:

"...to identify the critical factors affecting each project's potential for success, to specify what conditions or requirements are necessary, and to evaluate the possibility of achieving these requirements.

There is no standard format for a feasibility study, but there are a minimum of three special studies that should be undertaken: 1) market analysis; 2) financial analysis; 3) cost-benefit assessment. These studies should be undertaken for project start-ups, business expansions and acquisitions, and community development projects... The scope of each study will depend on the size and complexity of the prospective venture. If any major problems or weaknesses are identified, they must be examined thoroughly...."²

The authors explain that market analysis "must closely examine three factors: the project's product [in this case, the land owned by the Pattersons], the total potential market [what companies/developers might be interested in leasing this land], and competition [what other communities have land available that might compete with our land]." Id.

Presumably, one of the factors that would be looked at in a feasibility study would be the fact that **property taxes in Hadley**, located very close to this property, **are half what they are in Amherst**, providing a disincentive for a business to choose this site. Another factor to consider is whether the terms in the Ground Lease would be enticing to a business. This lease requires a business to pay \$415,000 for a period of 25 years before being able to purchase the property at a cost of \$5 million. Considering the current economy, this does not seem to be a very favorable deal for a potential business which might instead prefer to purchase land outright, rather than leasing for 25 years and paying an additional \$10.3 million on top of the \$5 million purchase price. This price seems high, particularly considering much of the land is wet, even containing ponds, and so would not be developable.

Since no feasibility study was done for this project, it is premature for Town Meeting to vote to authorize an appropriation of \$120,000 to implement the project.

Further exacerbating the lack of a feasibility study is the very speculative nature of this project. When I asked the Town Manager if there was any company that had expressed an interest in this property or if the Town had particular companies in mind that might be interested in the property, the answer was no.

- 3) **No concrete data was provided assessing infrastructure costs and there is no requirement that the developer/company contribute toward such costs:**

² Blakely, Edward J. and Green Leigh, Nancy, *Planning Local Economic Development: Theory and Practice*, (Thousand Oaks, California; Sage Publications, 2010), p. 364.

In the Town Manager's "Overview and Goals For the Development of the Patterson Property in North Amherst", dated March 12, 2010, Mr. Shaffer states that, "[a]t a minimum, the site would **require millions in infrastructure investment** to accommodate provide (sic) the water, sewer and road improvements needed to support a major development. **The Town of Amherst is in a unique position to bring resources to fund and provide the critical infrastructure needs** of this project, and to facilitate the recruitment and location of a major private concern to the site." (Emphasis added.)

This language implies that the Town will be at least partly (if not solely) responsible for infrastructure costs. I asked the Town Manager how many millions of dollars the infrastructure would be. He said "it could be three million, it could be five million." He said it depends on what type of business decides to lease the land; if it were a water intensive business, this would require more funding for infrastructure (i.e., perhaps in the five million dollar range). There has been discussion that the Town would apply for grants to cover much of the cost of the infrastructure; however, it can be risky and imprudent to make appropriations in hopes of a grant. I recall being told during the 2008 Town Meeting that the Town was hoping for a federal grant to cover 90% of the cost of a quint fire engine costing \$635,000. The grant did not come through and the town ended up paying outright for the entire \$635,000.

In addition, I have not seen anything in the legal agreements indicating that the developer/company would be required to contribute to the cost of the infrastructure. Section 8.2 of the Ground Lease pertaining to Initial Improvements states:

"Tenant intends to improve the Premises by bringing water, sewer, and other utilities to the Premises, and, if necessary under the Town's Bylaws to develop the Premises, by constructing a roadway leading to the Premises (the "Initial Improvements").

Ground Lease, p. 6. The Ground Lease states that the word "Tenant" refers to "the Town of Amherst,... Together with its assignee or nominee", (i.e., the business who would hopefully take over the lease from the Town. Tenant can presumably mean either party, or both. Perhaps this was purposely left ambiguous or intended to allow room for the Town to try to get the developer to contribute to infrastructure; however, I have read nothing saying that the developer/company is *required* to make any such contribution. I take this to mean it's possible that the Town could take on the burden of paying the entire cost. If that were the case, I would want to have more information about how the Town might fund \$5 million in infrastructure (e.g., if it were done with a bond, what would be the financial obligation of the Town for debt service per year, over how many years, and where would that funding come from?)

- 4) **According to the Ground Lease, the Town would also be responsible for the cost of leasing the property for \$415,000 annually from the time when the Ground Lease is first signed by the Town until the lease is assigned to the developer / company (who would then take over responsibility for paying lease payments from the Town).**

By my reading of the legal documents, the developer / company is not responsible for making the \$415,000 annual lease payments to the Pattersons until after the Ground Lease is assigned to them by the Town. There is nothing in the Ground Lease that implies that the Lease will be assigned simultaneously or immediately after the Town signs on to the Ground Lease. To the

contrary, the Ground Lease indicates that the assignment of the Lease could occur AFTER the Initial Improvements (i.e., the infrastructure) were completed and possibly after the building construction is completed. Also, the Ground Lease makes it harder for the Town to assign the lease to the developer / company during the Initial Construction Period and the Building Construction Period since these periods require written consent from the Landlord (Patterson) to allow an assignment whereas an assignment after a Certificate of Occupancy has been issued can be done without the Landlord's prior written consent.³

This means it is possible that the Town could be responsible for paying rent of \$415,000 per year for a period of one or more years while the Initial Construction period and the Building Construction Period are underway. The fact that the Town intends to assign the Ground Lease as soon as possible, hopefully immediately, does not change the fact that the legal contracts provide for scenarios that could result in the Town being responsible for rent through the Initial Construction and Building Construction Periods.

I recognize that Town Counsel's position is that Town Meeting would need to vote to authorize the signing of the Ground Lease if a developer / company is found. The implication is that Town Meeting need not be overly concerned with the nuances of the Ground Lease at this point. But the Ground Lease is part of the overall project proposal before Town Meeting. Also, there is a phenomenon of feeling compelled to proceed down a path once a significant financial expenditure has been spent. Therefore it is important to look as far down the path as possible before deciding whether or not to make that initial appropriation.

5) Since the town could play a marketing role and could agree to fund part or all of the infrastructure without buying the option, why is it necessary to buy the option?

I asked the Town Manager if the Pattersons had any other plans for sale or lease of this property if the Town did not purchase this option. The answer was no. From what I have read on the Town Meeting list-serve, the Pattersons have been using some of the area's best real estate agents for the past couple decades in the effort to find a buyer for this property, but no deal has been struck and few businesses have even expressed an interest. It would seem logical that the millions in infrastructure cost would be a strong deterrent for potential buyers. If there is little chance that another party will step in to buy this land without the Town's contribution for infrastructure, I do not see what is gained by the Town paying \$120,000 for an option to make sure no one else buys the land. The Town could presumably try to market the land while informing potential businesses that the Town would be willing to sign an agreement to provide infrastructure if the business signs a lease with the Pattersons. This would not require us to pay \$120,000 for this option.

³ The Ground Lease states in relevant part: "For the period beginning on the Commencement Date and ending on the date the Initial Improvements have been completed (the "Initial Construction Period"), provided that Tenant is not in default of the provisions of this Lease ..., Tenant may assign, transfer, or sublease, in whole or in part, this Lease or its rights and obligations under the Lease, in whole or in part....only with Landlord's prior written consent...." The Ground Lease further states: "After a certificate of Occupancy has been issued for the entire Initial Structure,... Tenant may assign, transfer, or sublease, in whole or in part, this Lease or its rights and obligations under the Lease, in whole or in part.... without Landlord's prior written consent." (Emphasis added.) Ground Lease, p. 13.

- 6) There need not be an appropriation of all three years up front (i.e., \$120,000), rather than \$40,000 annually.**

The proposed option costs \$40,000 for one year, with the possibility of renewing for two subsequent years. It is not required that all three years be paid in one lump sum. (Presumably, if this appropriation is authorized, the Town would not pay the Landowner the full \$120,000 up front, but would rather pay only \$40,000 for the first year and then for the two remaining years.) While seeking the entire amount up front might be seen as helping to entice a business to come to that location, it also ties Town Meeting's hands and prevents Town Meeting from taking a fresh look at whether to fund the option for a second and third year based on the progress (or lack of) seen during the first year.

- 7) This project is inconsistent with Smart Growth principles which are part of the core of the Master Plan.**

Here is a description of the philosophy of "Smart Growth":

In communities across the nation, there is a growing concern that current development patterns – dominated by what some call "sprawl" --- are no longer in the long-term interest of our cities, existing suburbs, small towns, rural communities, or wilderness areas. Though supportive of growth, communities are questioning the economic costs of abandoning infrastructure in the city only to rebuild it further out....New smart growth is more town-centered, is transit and pedestrian oriented, and has a greater mix of housing, commercial and retail uses. It also preserves open space and has many other environmental amenities.⁴

This project is the antithesis of Smart Growth: it is creating sprawl, building infrastructure outside of all of the Town's designated village centers, opting to develop untouched open space rather than redeveloping brownfields, and situating development in an area with little pedestrian access and not providing any data on access to public transportation. This project proposes to build over beautiful open space, including fields that could possibly one day support farming or grazing (as is currently done on a neighboring property) in the event Amherst needs to shift more to a local economy to avoid dependence on oil which will become increasingly scarce and costly.

Minority View on Other JCPC Issues:

At the last JCPC meeting, the committee voted in favor of a tentative five year capital plan. While I recognize that this plan is only tentative and will change significantly in the years to come, for the following reasons, I chose to abstain from this vote:

⁴ Website of the Smart Growth Network, visited on April 21, 2010, at the following link:
<http://www.smartgrowth.org/about/default.asp>.

- **The need for greater oversight by the Joint Capital Planning Committee itself over funds appropriated in the past based on JCPC recommendations.**

I think transparency and oversight should be a basic component of any committee that makes recommendations to Town Meeting for funding. The Community Preservation Act Committee has a practice of requiring groups which are seeking funding for new projects to offer status reports on old projects funded with CPA funds. This practice serves many purposes: 1) it provides greater transparencies for the Board and taxpayers; 2) it helps the Committee determine whether a group might have too much on their plate already, making it unlikely they would be able to fully implement the new projects proposed; 3) it helps insure that tax payers money is put where it will have the greatest immediate use.; 4) it helps keep track of unspent funds which sometimes result in 'give-backs' to the Committee that frees up funds for future projects. For all these same reasons, I think the JCPC should have a similar monitoring system.

Close to the end of the JCPC's funding recommendation process, members were provided with a chart of all JCPC accounts that still had funding available from prior years. I was surprised to learn that numerous JCPC projects that were recommended for funding more than 5 years ago had still not been completed, therefore the funds were simply sitting in an account, unspent for more than half a decade. Some of the oldest appropriations which still remain unspent are: \$35,961.26 appropriated for FY2003 for the North Amherst School; \$31,565 appropriated for FY2004 for the Amherst Community Childcare Facility's HVAC (heating, ventilation, air conditioning) repair; \$12,900 appropriated for FY2002 for the Town's Munson Memorial Building with another appropriation to the Munson in FY2003, with \$10,311.01 remaining; \$6,100.74 from a FY2004 appropriation for Conservation Pathway; and \$6,730 from a FY2002 appropriation for a Planning Department project for Unitarian Plaza. These appropriations alone (which do not include many appropriations from more recent years) total more than \$100,000. There has been no process by which the JCPC as a committee has reviewed these appropriations or heard feedback from Department Heads as to why projects have not been completed in the more than half decade since the funding was secured, or if such funding was unneeded, why these funds have not been returned to the JCPC for reallocation to other projects. I raised this concern with the JCPC and am pleased that Committee members have said they will be discussing this issue in the fall.

- **The need for more information about projects listed in the five year plan, such as the proposed building of a \$7.2 million fire station.**

I voted to abstain from supporting the JCPC's tentative five year plan because the decision about what projects would be listed in the unfunded column as compared to a couple major projects that were listed in the funded columns (such as a third fire station costing \$7.2 million dollars) was not discussed by the Committee itself in more than a cursory manner. For example, no explanation was given by Town staff as to why the many items that were placed in the 'unfunded' category should be relegated to that column. In addition, though it was reported that a feasibility study had been conducted regarding the building of a third fire station, this study was not provided to the current members of the JCPC. The JCPC current report states that, "Capital funding for a new fire station is deferred until FY 14, but may be accelerated." I think it is premature for the Committee to make such a statement.